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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

CRAIG D. HANSON

Plaintiff,

v.

COUNTY OF KITSAP, WASHINGTON;
and DAVID LYNAM,

Defendants.

NO. CV 3:13-5388-RJB

PLAINTIFF'S TRIAL BRIEF

NOTE ON MOTION CALENDAR:
August 8, 2014

Plaintiff Craig Hanson submits this trial brief in accordance with the Court's scheduling order, Dkt. 30.

A. The Court should issue a detailed circumstantial evidence jury instruction and allow Mr. Hanson to introduce circumstantial evidence in support of his claims.

Defendants vehemently deny that Mr. Hanson's military service and complaint to the ESGR were a factor in Mr. Hanson's non-promotion to DFM2 and demotion from the fire investigation rotation. As such, the law allows Mr. Hanson to prove his discrimination and

1 retaliation claims through circumstantial evidence. Circumstantial evidence includes (a) the
2 "employer's expressed hostility towards members protected by the statute together with knowledge
3 of the employee's military activity" (b) "disparate treatment of certain employees compared to
4 other employees with similar work records" (c) proximity in time between exercising the protected
5 activity and the adverse action, (d) the employer not following its own policies; (e) inconsistencies
6 between the employer's proffered reason and other actions of the employer; and (f) the employer's
7 history of discrimination. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002)(citing
8 *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1012 (Fed. Cir. 2001)). *See also Diaz v. Eagle*
9 *Produce Ltd. P'ship*, 521 F.3d 1201, 1214 (9th Cir. 2008)(citing *Brennan v. GTE Govt. Sys. Corp.*,
10 150 F.3d 21, 29 (1st Cir.1998) ("Deviation from established policy or practice may be evidence of
11 pretext.")); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

12
13 Among other things, Mr. Hanson will show that the County deviated from its policies by
14 (a) retaining Mr. Wiggins and Shepherd in violation of the County's "extra help" policy; (b)
15 disclosing confidential interview notes from Mr. Hanson's April 2013 DFM 2 interview, and (c)
16 delaying payment (for the tune of two years) of Mr. Hanson's 2012 longevity bonus. Mr. Hanson
17 will show different treatment of similarly situated individuals given that Ms. Blackwood and Mr.
18 Wiggins were placed in deputy fire marshal positions without having to appear before an interview
19 panel similar to what Mr. Hanson faced in April 2013. Mr. Hanson will show the overt hostility
20 by testifying to co-worker statements regarding his return from military service and how those
21 statements drove him to approach Mr. Lynam, and, when that failed, complain to the ESGR. Mr.
22 Hanson will establish inconsistencies relating to the County's reasons for its actions toward Mr.
23 Hanson. The Court should allow Mr. Hanson to present such evidence.

24
25 Additionally, the Court should allow Mr. Hanson to present a jury instruction that sets out
the above examples of circumstantial evidence. The instruction Mr. Hanson seeks is Disputed

1 USERRA Instruction No. 8 – Motivating Factor. Such an instruction will aid the jury in applying
2 the circumstantial evidence presented in the case to the legal definition of circumstantial evidence
3 as it relates to the “motivating factor” of Mr. Hanson’s USERRA retaliation/failure to promote
4 claims. Additionally, Mr. Hanson’s “motivating instruction should incorporate the language of
5 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) which describes a “motivating factor” as
6 a factor that “plays a part” in an adverse employment decision. Characterizing a “motivating
7 factor” as something that “plays a part” will aid the jury in understanding the meaning of the
8 “motivating factor” phrase.

9 **B. The Court should allow Mr. Hanson to issue a USERRA theory of the case**
10 **jury instruction.**

11 “A party is entitled to an instruction about her theory of the case if it is (1) supported by
12 law, (2) has foundation in the evidence, and (3) was not covered by other instructions.” *Robin v.*
13 *City of Monrovia*, 520 F. App’x 496, 498 (9th Cir. 2013).

14 Mr. Hanson’s proposed USERRA instruction No. 1 is such a theory of the case instruction.
15 Such an instruction is supported by the law, has a foundation in the evidence in this case (i.e. Mr.
16 Hanson is a returning veteran who made a complaint to the ESGR regarding a violation of his
17 USERRA rights), and is not covered by other instructions.

18 **C. The Court should inform the jury that Mr. Hanson does not have to find Dave**
19 **Lynam liable in order to find Kitsap County liable.**

20 Defendants propose a jury instruction that informs that jury that if the jury does not find
21 Dave Lynam liable then the jury cannot find Kitsap County liable.

22 Such an instruction is improper as Mr. Lynam and Kitsap County are recognized as
23 separate employers under USERRA. 38 U.S.C. § 4303(4). As such, Kitsap County and David
24 Lynam are being sued as separate employers. Therefore, a non-finding of liability as to one
25 employer does not foreclose a finding of liability against a second employer. Accordingly, the

1 Court should allow Mr. Hanson to use his USERRA employer instruction so as to inform the jury
 2 of the employer status of both defendants. Conversely, the “Principal/Agent” instruction proposed
 3 by the defense will confuse the jury, misstates the USERRA statute, and should not be used.

4 **D. The Court should adopt the 11th Circuit’s instruction as to Mr. Hanson’s 38**
 5 **U.S.C. § 4316(c) failure to promote claim and use Mr. Hanson’s 38 U.S.C. § 4316 “demotion”**
 6 **instruction.**

7 The 9th Circuit does not have USERRA pattern jury instructions. 11th Circuit Court of
 8 Appeals, however, does. The 11th Circuit’s §4316(c) pattern instruction contains the following
 9 language that addresses defendants’ §4316(c) defense:

10 Where, as here, Defendant alleges a legitimate nondiscriminatory
 11 reason for the termination of Plaintiff, such as a layoff or elimination
 12 of Plaintiff’s position, Defendant bears the burden of proving by a
 13 preponderance of the evidence that the layoff or job elimination was
 14 for a legitimate nondiscriminatory reason and that such layoff would
 15 have affected anybody in Plaintiff’s position, regardless of his or her
 16 protected status or activity. *See* 11th Circuit Model Jury Instructions,
 17 Section 4.20, pg. 309 available at
 18 [http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCi](http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf)
 19 [vilPatternJuryInstruction.pdf](http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf) (last visited August 6, 2014).

20 The defendants’ proposed instruction cites the same 11th Circuit pattern instruction but
 21 omits the “and that such layoff would have affected anybody in Plaintiff’s position, regardless of
 22 his or her protected status or activity” language. Since USERRA commentators and the 11th
 23 Circuit approve such language, that underlined language should be included. Piscitelli & Still The
 24 USERRA Manual pg. 159 n. 19, §6:6 (2011 ed.)

25 The defendants’ proposed § 4316(c) instruction also violates a motion in limine to which
 defendants stipulated. The defendants’ proposed instruction states “[a] defendant has cause to
demote an employee when the demotion is based upon the Plaintiff’s conduct or some other
 legitimate non-retaliatory reason, such as the elimination of the Plaintiff’s job position.” Yet
 defendants stipulated to *not* assert a “demotion based upon the Plaintiff’s conduct” defense. (Dkt.
 160, pg. 4-5) Thus, the underlined language should be stricken from any §4316(c) instruction.

1 **E. The court should allow Mr. Hanson to utilize USERRA Instruction No. 5.**

2 Mr. Hanson seeks to inform the jury that federal regulations require an employer to remove
3 replacement employees upon the veteran's return to the workplace. That regulation is 20 C.F.R. §
4 1002.139 and provides, in part, "[t]he employer may not, however, refuse to reemploy the
5 employee on the basis that another employee was hired to fill the reemployment position during
6 the employee's absence, even if reemployment might require the termination of that replacement
7 employee." Mr. Hanson will testify that it was his understanding of the regulation that was one of
8 the factors that led him to make his January 2, 2013, ESGR complaint. Such an instruction is
9 needed to show the jury of Mr. Hanson's good faith belief that he was being discriminated against.

10 Additionally, the instruction is also important as Mr. Hanson can use the County's failure
11 to follow the above-referenced CFR as circumstantial evidence of tortious conduct, here
12 discrimination and retaliation. *See Mathis v. Ammons*, 84 Wn. App. 411, 419, n. 16 (1996); RCW
13 5.40.050.

14
15 DATED this 8th day of August 2014.

16 /s Matthew Crotty
17 MATTHEW Z. CROTTY
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August 2014,

1. I served the foregoing via the Court's CM/ECF system:

Jacquelyn Moore Aufderheide jaufderh@co.kitsap.wa.us,

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2. I have caused to be hand-delivered the document to the following participants at the addresses listed below: none.

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